

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.616 of 1986

\*\*

For Approval and Signature:

Hon'ble MR.JUSTICE R.A.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

1 to 5 : No

-----  
V N CONTRACTOR

Versus

STATE OF GUJARAT

-----  
Appearance:

MR NALIN K THAKKER for Petitioner  
Ms.S.D. Talati, AGP for respondent-State

-----  
CORAM : MR.JUSTICE R.A.MEHTA

Date of decision: 24/12/97

ORAL JUDGEMENT :

The petitioner claims deemed dates of promotions as Deputy Engineer and Executive Engineer. He was a Supervisor and was promoted as Deputy Engineer in 1971. He claims that he was wrongly superseded and should have been promoted in 1968 when his juniors were promoted.

2. The petitioner had filed Special Civil Application No.2465 of 1981, which was decided on 6th July 1982. The High Court held that the petitioner had submitted a number of representations, which are not decided. Therefore, it, prima facie, appeared to the

Court that there was substance in the claim of the petitioner. The respondent had not filed any reply. Long time elapsed between the date when injustice sought to have been caused to the petitioner for the first time and the date of filing of the petition. The High Court further observed that those persons who may be affected one way or the other by its decision have not been joined as parties in the petition. For all those reasons, the High Court directed the State Government to consider all the representations made by the petitioner. Consequently, the Court passed order as follows :

"In the result, this petition is partly allowed. The respondent State is directed to consider all the representations made by the petitioner from time to time and referred to in this judgment as expeditiously as possible and preferably within a period of 3 months from today and decide the questions as to whether the petitioner should have been considered for promotion of the higher post of Deputy Engineer earlier than 1971 and what should be the deemed date of his promotion in case he is found to be entitled to have been considered and promoted earlier than in 1971. In case the petitioner's representations are accepted by the respondent State, in that event, he will be entitled to all the consequential benefits available to him on that basis, and the respondent State is directed to pass necessary consequential orders in that behalf within a reasonable time. Rule is made absolute to the above extent with no order as to costs."

3. The petitioner's representation was rejected.

4. The petitioner, therefore, filed Special Civil application No.4464 of 1985, which came to be heard and decided on 18/19th November 1985. In that petition, the petitioner had challenged his supersession in 1968 and seniority list. By the time the petition came up for final hearing, a final seniority list was published. The petition, therefore, was withdrawn as having become infructuous with a liberty to challenge the final seniority list. Thereupon the present petition being Special Civil Application No.616 of 1986 is filed.

5. As far as the challenge to the final seniority list is concerned, which is published in 1985, there is no difficulty and the same can be considered. However,

as far as the claim for deemed date of promotion to the post of Deputy Engineer is concerned, it has nothing to do with the preparation of the seniority list. The seniority list of Deputy Engineers had number of rounds of litigations in this High Court, where questions of principles of seniority on the basis of quota and rota were involved and there was no question of any individual case of supersession and non promotion.

6. As far as the petitioner's case of non promotion in 1968 is concerned it was based on the relevant criteria for selection. The criteria for selection are proved merit and efficiency. The petitioner was not promoted because of some adverse entries in the Confidential Reports. The petitioner's case is that he had not been communicated such adverse remarks. In any case, when the criteria are proved merit and efficiency even if the adverse remarks are ignored, that would not entitle the person to be promoted. The incumbent must have positive merit to satisfy the criteria of proved merit and efficiency. Even otherwise, the claim of promotion in 1968 is too stale in 1982, 1985 or 1986.

7. However, as regards the claim of the deemed date in 1982 is concerned the petitioner is on a sounder footing. On 3.11.1982, S/Shri K.S. Patel and G.K. Patel, Deputy Engineers were promoted as Executive Engineers. In the provisional seniority list they were at seniority list no.29 and 31 respectively and the petitioner was at serial no.42. Therefore, those two persons, who were shown as senior to the petitioner promoted on 3.11.1982.

8. However, when the final seniority list is published the position was reversed. The petitioner, who was at sl.no.42 is now shown at sl.no.33 and S/Shri K.S.Patel and G.K.Patel, who were at sl.nos.29 and 31 respectively are now shown junior to the petitioner at sl.nos.47 and 48 respectively. It is thus, clear that on the basis of the final seniority, the petitioner is entitled to be promoted as Executive Engineer with effect from 3.11.1982, when his juniors were promoted.

9. In a similar case, one Shri N.J.Panchal, was also shown junior to S/Shri K.S. Patel and G.K. Patel, and was not promoted in 1982, but was promoted on 26.4.1985. But when the final seniority list was published, he was shown senior to these two persons. Therefore, he was given the deemed date of promotion by the Government Resolution dated 28th May 1986, Annexure 'I' to the petition and his pay had been fixed according to that

deemed date with effect from 3.11.1982 for promotion as Executive Engineer. The Government Resolution also made it clear that no arrears should be paid till he actually takes over as Executive Engineer. In the present case also the same direction is required to be given.

10. Learned counsel for the petitioner submitted that the petitioner should be paid arrears as a result of the retrospective deemed date of promotion.

11. In a similar situation in the case of State of Haryana & others vs. O.P. Gupta, etc., AIR 1996 SC 2936, the Supreme Court had reversed the High Court direction for payment of arrears and observed :

"8. In these appeals unless the seniority list is prepared and finalised and promotions are made in accordance with the rules on the basis of the above seniority list, the question of entitlement to work in the promotional posts does not arise. Consequently, the payment of arrears of salary does not arise since, admittedly the respondents had not worked during that period. The High Court, was, therefore, wholly illegal in directing payment of arrears of salary. The order of the High Court accordingly is quashed."

12. In the present case also the grievance is that the seniority list was wrongly prepared by the Government denying the petitioner his entitlement to work on the promotional post; the petitioner was willing to work on the higher post; therefore, he should be paid arrears of salary. The Supreme Court has negatived that contention and held that the entitlement to the promotion is only on the finalisation of seniority list and merely giving retrospective deemed date would not entitle the incumbent to arrears of salary for the higher post in which he had not worked. Therefore, in this case also, such arrears cannot be permitted.

13. In the result, the petition partly succeeds. Rule is made absolute, by directing that the petitioner shall be granted deemed date, is deemed to have been promoted and appointed to officiate as Executive Engineer with effect from 3.11.1982, viz. from the date of promotion of his juniors, S/Shri K.S. Patel and G.K. Patel, as Executive Engineer. The petitioner's pay, therefore, shall be fixed and worked out accordingly. However, no arrears should be paid to him for the period from 3.11.1982 till he actually took over as Executive Engineer.

-oOo-  
karim\*